XV. IMPLEMENTING MUST CARRY AND RETRANSMISSION CONSENT

NAB concurs with the Commission's general transition scheme from must carry to must carry/retransmission consent outlined in paragraphs 48 through 50 of the *Notice*. Specifically, we agree with Commission's conclusions that the effective date of the must carry rules must not be delayed until the retransmission consent provisions become operational, and that during the initial period after the must carry rules become effective and before retransmission becomes effective, cable systems must provide 30 days advance written notice before deleting a local commercial television station from carriage.

We anticipate that the Commission will simultaneously adopt and release its must carry and retransmission consent rules at its April 1, 1993 meeting. The next step that must take place is for stations to notify cable systems on which they are eligible for must carry of their channel position election. In an effort to facilitate this process, NAB will contact all television stations early in 1993 to urge them to make their channel preferences known to cable systems on which they are must carry eligible as soon as possible.

We recommend that, in any event, stations be required to notify affected cable systems of their channel position preference not later than 30 days after the Commission's rules are released. Stations failing to do so should remain on their current channel position unless that position has been requested by another station, in which case the cable operator can reposition them to any of the other channel positions provided for in the Act. During this same initial 30-day period, cable operators

should be required to send to affected stations notices either that they do not comply with the good quality signal requirement and/or that a copyright fee will be incurred for the station to remain must carry eligible.

Following this initial 30-day mutual notice period, a subsequent 30 day period should be designated for parties to work out problems brought to light by the initial notices. Within 60 days after the Commission's rules are released, cable operators should be expected to be in full compliance with the provisions of the must carry rules.[41/]

With respect to making must carry/retransmission consent elections, NAB recommends establishing an August 2, 1993 deadline for stations to notify cable systems of their election. This would provide slightly more than 60 days before the October 6, 1993, effective date for retransmission consent for stations opting for retransmission consent to complete negotiations with affected cable systems.

Stations failing to make an election by August 2, 1993 should be presumed to have elected must carry on the channel on which they are then being carried. The findings in the Cable Act demonstrate that Congress was generally concerned with ensuring that viewers have access to local television stations and programming. *See, e.g.*, §§ 2(a)(9)-(11) of the Cable Act. Establishing must carry as the default if a station fails to make an election would advance Congress' purpose by promoting

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41/ An additional limited grace period may be appropriate to accommodate specific situations where more time is needed for stations and cable operators to work out problems relating to such issues as delivering a good quality signal to the headend, completing copyright indemnification agreements and resolving mutually exclusive channel positioning claims.

carriage of the greatest number of local signals. It also would ensure that stations which fail to make an election on a small cable system because they are not aware that the cable system carries their signal or whose election is not made through inadvertence would not have to be suddenly removed from cable systems which now carry them.[42/]

The Commission proposes requiring stations to place a notarized copy of their election statements in their public file and to send such statements to every cable system within a station's market. NAB has no objection to the public file requirement, but sees no need or benefit in requiring a station to send all of its individual system election statements to all cable systems in its market. Cable systems should only be sent election statements that affect them.

The Commission asks for comment on the interplay between retransmission consent and the cable compulsory license in connection with its setting up procedures implementing the election of retransmission consent status by broadcasters otherwise entitled to mandatory carriage. The Commission specifically cites the procedure under the compulsory license whereby a distant signal carried during only part of a six-month accounting period is paid for as if it were carried for the entire six-month period.

In this regard, it appears preferable for the Commission to schedule subsequent triennial elections to coincide with the semi-annual accounting periods established by

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42/ An assumption that a station had elected retransmission consent would also appear to be unworkable in that there would be no basis on which to establish the terms and conditions of such consent.

the Copyright Office. If this suggestion is not adopted, and situations arise where a cable operator has the option to and, in fact, drops a distant must carry station within a six month accounting period, the station should be absolved of all responsibility to indemnify the cable operator for copyright fees incurred as a result of carriage of the station during the period.[43/] If, on the other hand, a station changes its election in the middle of an accounting period, the station should be held responsible for any copyright fees incurred as a result of its being carried during the accounting period.[44/]

The Commission points out (*Notice* ¶ 54) that the Senate Committee Report addresses the question of whether stations which would be eligible for must carry treatment on a cable system, but which are carried pursuant to a retransmission consent agreement, should be counted towards that cable system's local signal carriage obligations. NAB agrees with the Commission that stations carried under retransmission consent should be deemed as meeting part of a cable system's signal carriage obligations.

In paragraphs 55-56 and 60 of the *Notice*, the Commission recognizes that stations which elect to negotiate for retransmission consent are not entitled to many of the protections established under the Act for must carry stations. Issues such as

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43/ Attempts at prorating the fee would be hopelessly complicated in that it would require, among other things, prorating the cable operators gross revenues over the accounting period.

44/ If the station's change in election is from must carry to retransmission consent, the parties should be free to negotiate the terms of payment of royalties as part of the overall retransmission consent negotiations.

channel positioning and carriage of material on subcarriers or in the VBI of retransmission consent stations would be expected to be part of the negotiations between cable systems and stations which elect retransmission consent.[45/] The Commission's proposal that none of the provisions of section 614 apply to retransmission consent stations, however, ignores one critical distinction in the language Congress used in the Cable Act. As the Commission notes in paragraph 56, the language Congress used in section 614 varies. Some provisions apply to signals "carried in fulfillment of the requirements of this section," or similar language; other provisions apply to the carriage of "local commercial television stations," the Act's defined term for must carry stations. With respect to those provisions, NAB agrees that they do not apply to stations which are carried under retransmission consent agreements.

Section 614(b)(3)(B) of the Act, however, is strikingly different. It provides:

> "The cable operator shall carry the entirety of the program schedule *of any television station carried on the cable system* unless carriage of specific programming is prohibited, and other programming authorized to be substituted, under section 76.67 or subpart F of part 76 of title 47, Code of Federal Regulations (as in effect on January 1, 1991), or any successor regulations thereto." (emphasis added)

45/ The Commission notes (*Notice* ¶ 59) that it already has certain rules in place governing the treatment of broadcast signals by cable systems. NAB agrees that the must carry provisions of the Cable Act generally do not require the Commission to amend these rules applicable to carriage of any television signal and which protect the interests of cable consumers as well as television stations. To the extent that any of these rules create narrower obligations than provisions of the Cable Act, however, their retention should not be understood as relieving cable systems from their statutory obligations.

Congress could not have been more unambiguous -- "cherry-picking" of *all* broadcast signals by cable systems is prohibited. The House Report states: "Subsection (b)(3)(B) prohibits 'cherry picking' of programs from television stations by requiring cable systems to carry the entirety of the program schedule of television stations they carry."[46/] It does not suggest that this provision was intended to apply only to must carry stations. The Senate Report is even more explicit.[47/] While section 325(b)(4) provides that the provisions of section 614 shall not apply to carriage of stations electing retransmission consent, it is logical to construe that provision to apply to the protections Congress established only for must carry stations, and not section 614(b)(3)(B) which was intended to govern any carriage of a broadcast signal. Indeed, the fact that the House and Senate cable bills included the identical broad cherry-picking prohibition, but the House bill did not contain retransmission consent provisions, is a further indication that Congress intended that cable systems not be given the choice of carrying only selected portions of any television station's program schedule.

Adopting this construction of the Act also would relieve the Commission from the necessity of addressing numerous issues which it recognizes will arise if cable systems can negotiate for only part of a station's signal. Paragraph 61 of the *Notice* sets out some of these thorny questions. Congress would not have adopted the

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46/ H.R. REP. No. 628, 102d Cong., 2d Sess. 93 (1992); *see also id.* at 57 n. 75.

47/ S. REP. No. 92, 102d Cong. 1st Sess. 85 (1991)(Cable systems must carry "the entirety of the program schedule of any television stations carried on the cable system . . .").

detailed must carry and retransmission consent provisions in the Cable Act governing almost every aspect of the relationship between cable systems and television stations if it intended to leave open a loophole which might permit a cable operator effectively to exempt itself from many of those provisions by carrying only a portion of retransmission consent signals.

Finally, permitting cable operators and television stations to negotiate for carriage of only particular parts of stations' program schedules would be inconsistent with the line Congress drew between rights to broadcast signals, which are governed by retransmission consent, and rights to particular programs, which are dealt with under copyright. *See* H.R. REP. No. 862, 102d Cong., 2d Sess. 76-77 (1992). The rules which the Commission adopts, therefore, should provide that the requirement to carry the entire program schedule applies equally to stations carried pursuant to must carry and retransmission consent.

XVI. STATIONS ELECTING MUST CARRY THAT ARE NOT CARRIED

In Paragraph 63 of the *Notice*, the Commission seeks comment on how to deal with situations in which a station's must carry election is not honored initially, but subsequently the station is approached by a cable system in its local market wanting to carry its signal. This situation could arise in a number of contexts including, but not limited to, instances where: 1) at the time of the election, there are more must carry qualified stations than the cable system is required to carry based upon its channel capacity; 2) subsequent to the election new stations enter the market resulting in more must carry qualified stations than the cable system is required to carry; or 3) the cable

system increases its channel capacity. Likewise, situations could arise where a station's must carry election initially is honored, but the station is later denied carriage.

Under any of these scenarios, the station whose must carry election is not honored *automatically* regains its retransmission consent rights with respect to the relevant cable system.[48/] In other words, the moment a station receives notice from a cable system that its must carry election will not be honored, that cable system can no longer carry the station's signal without its consent (so long as this occurs after October 6, 1993, the effective date of retransmission consent).

If the station whose must carry election is denied subsequently enters into a retransmission consent agreement with the cable operator, the parties should be free to specify within the terms of that agreement whether the station is preserving its must carry election in the event a must carry "slot" becomes available. If no retransmission consent agreement is executed, the station's must carry election should be deemed to remain in effect (including preservation of its channel positioning rights) in the event the cable operator later decides to carry it pursuant to Section 614 of the Act.

Finally, the Commission's rules should make clear that a cable operator is free to honor must carry elections in excess of the minimum number required by its channel capacity under the Act, which it may choose to do in order to avoid having to

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48/ We disagree with the implied assumption in paragraph 63 of the *Notice* that stations whose must carry election is not honored must take some affirmative step to "assert" their retransmission rights.

engage in retransmission consent negotiations with stations in excess of its must carry quota that elect must carry.

XVII. PROGRAM EXHIBITION RIGHTS AND RETRANSMISSION CONSENT

In paragraphs 64 and 65 of the *Notice*, the Commission appears to labor under the misguided assumption that there is, or should be, some nexus between its retransmission consent rules and program exhibition rights under the Copyright Act. Clearly, no such nexus exists.

Paragraph 64 of the *Notice* cites to the seminal language from the Senate Report which distinguishes between "the authority granted broadcasters under the new Section 325(b)(1) of the 1934 Act to consent or withhold consent for the retransmission of the broadcast signal, and the interests of the copyright holders in the programming contained in that signal."[49/] This crucial delineation between rights in a signal versus copyrights to the programs in the signal is nothing new in Section 325 jurisprudence. In *In re Applications of Board of County Commissioners, Monroe County, Fla*, 72 FCC 2d 683 (1979), a party opposing grant of authority to construct television translators asserted that the translator applications should be denied because the applicant had failed to obtain the copyright consent of all of the program suppliers whose programs would be retransmitted on the translators. In rejecting this argument, the Commission correctly ruled that:

> "All that is required by Section 325(a) is that consent be obtained from the originating station. Neither the statute

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49/ S. REP. No. 92, 102d Cong., 1st Sess. 36 (1991).

> nor our rules require the consent of anyone else [cites omitted]. To construe Section 325(a) to require the consent of each program syndicator on a program by program basis would effectively read into the Act a requirement not imposed by Congress."[50/]

The Commission's suggestion that it "must determine whether the broadcast station need obtain any permission from the copyright holders of its programming before granting retransmission consent to a cable system,"[51/] would read into Section 325(b) of the Act a requirement not imposed by Congress just as requiring a translator to obtain such permission would have read into Section 325(a) of the Act a requirement not imposed by Congress. Not only did Congress not impose such a requirement, the above-referenced language of the Senate Report, when read together with the proviso in Section 325(b)(6) that "[N]othing in this section shall be construed

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50/ 72 FCC 2d at 689. While the party opposing construction of the translators renewed its program-by-program consent requirement argument on appeal, the court found the resolution of that issue to be unnecessary until the applicant filed licenses to operate the stations. *Tele-Media Corp. v. FCC*, 697 F.2d 402, 416 (D.C. Cir. 1983). While translators may well ultimately be required to obtain consents of the copyright owners whose programs they retransmit, although not necessarily as a condition of obtaining retransmission consent from an originating broadcaster, cable operators, by virtue of the cable compulsory license, have no such requirement.

51/ *Notice* ¶ 65. Although the Commission framed its question in terms of whether stations must somehow obtain some sort of additional authorization for retransmission consent from "the copyright holders" (*Notice* ¶ 65), stations are themselves copyright holders as well. They own the copyright in programs they produce, programs of which they are the relevant exclusive licensees, and the compilation or collective work represented by their entire broadcast day. But just like the copyright owners of all the other programs they broadcast (including syndicated programs, sports programs and music), stations lost the right, as a matter of *copyright* law, to authorize -- or refuse to authorize -- cable carriage of their copyrighted works pursuant to the compulsory license in Section 111 of the Copyright Act.

as modifying the compulsory copyright license established in Section 111 of Title 17, United States Code...", can only be interpreted to mean that Congress meant to preclude any "prior consent" requirement by program suppliers.[52/]

Congress' clear intent was that issues relating to the retransmission consent provisions of the *Communications Act* relating to a station's signal should be regulated by the Commission, but that any copyright issues are, and should remain, within the province of the cable compulsory license.[53/] A station's granting or denying of retransmission consent in its signal under the Communications Act has no legal effect whatsoever on the pre-existing copyright rights of copyright owners under the compulsory license.[54/] By the same token, whether or not any program supplier has

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52/ This conclusion is bolstered by Congress' rejection of MPAA's strenuous, but unsuccessful, attempts to derail retransmission consent by arguing such consent was merely a surrogate of copyright and that a station's signal is no more than the sum of its individual program components. *See* Statement of Jack Valenti Before the Subcommittee on Intellectual Property and Judicial Administration of the House Judiciary Committee on H.R. 4511 "The Copyright Broadcasting Retransmission Licensing Act of 1992" (April 1, 1992) at 3, 7, 9 ("[The] transmitter is worthless without the copyrighted programs of creative producers").

53/ To the extent that any program supplier feels that the grant of retransmission consent by a station violates the station's program contract with the supplier, the appropriate remedy should be sought in the courts.

54/ The copyright law aspects of the current situation are like those prevailing in the regulatory environment that existed prior to 1980. The Commission's extensive signal carriage rules authorized the carriage of certain distant signals or kinds of distant signals, and not others. These communications-policy restrictions resulted in cable systems' making choices to fill their carriage quotas from among potentially available distant signals based on a variety of considerations, including cost of acquisition. Cable operators will presumably consider similar factors in choosing which signals to carry as they negotiate retransmission consent agreements with stations. But whatever new consider-

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or has not made a particular arrangement with a station should not determine, from the Commission's perspective, the station's right to grant or withhold retransmission consent.

XVIII. REASONABLENESS OF RATES

NAB concurs with the Commission's determination that issues relating to the impact of retransmission consent on cable rates should be resolved in the pending rate-making proceeding.

CONCLUSION

The task which Congress handed the Commission in this proceeding is to establish simple, effective procedures to implement television stations' new must carry and retransmission consent rights in a smooth fashion. The Commission should adopt rules which clearly set forth stations' rights and cable systems' obligations and provide for an orderly transition to a retransmission consent environment. Given the wide variation in cable systems and television markets, however, the Commission should not attempt in this proceeding to resolve all questions which might arise in a particular situation, leaving particular issues to be resolved in good faith negotiations

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[54/](...continued)

ations are introduced by the retransmission consent requirements of the Cable Act, they will leave completely unaffected the copyright status of the programs owned by all copyright holders -- including the stations themselves -- that are retransmitted pursuant to the cable compulsory license.

among the affected parties and by the Commission in adjudication where it can better take into account the facts surrounding such disputes.

Respectfully submitted,

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APPENDIX A

Retransmission Consent Requirement For Cable Systems and Multichannel Video Programming Distributors

§ _____ Purpose.

The rules and regulations set forth in this subpart provide for exceptions to the requirement that a cable television system or other multichannel video programming distributor obtain the express consent of a broadcasting station whose signal it retransmits.

§ _____ Definitions.

As used in this subpart,

(a) The term "multichannel video programming distributor" means a person such as, but not limited to, a cable system, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming.

(b) The term "satellite carrier" means an entity that uses the facilities of a domestic satellite service licensed by the Commission to establish and operate a channel of communications for point-to-point distribution of television station signals and that owns or leases a capacity or service on a satellite in order to provide such point-to-mulitpoint distribution, except to the extent that such entity provides such distribution pursuant to tariff under the Communications Act of 1934, other than for private home viewing.

(c) The term "superstation" means a television broadcast station, other than a network station, licensed by the Commission that is secondarily transmitted by a satellite carrier.

(d) The term "unserved household" with respect to a particular television network, means a household that

(i) cannot receive, through the use of a conventional outdoor rooftop receiving antenna, an over-the-air signal of Grade B intensity as defined by § 73.683(a) of a primary network station affiliated with that network, and

(ii) has not, within 90 days before the date on which that household subscribes, either initially or on renewal, to receive secondary transmissions by a satellite carrier of a network station affiliated with that network, subscribed to a cable system that provides the signal of a primary network station affiliated with that network.

(e) The term "network station" means a television broadcast station that is owned or operated by, or affiliated with, one or more of the television networks in the United States providing nationwide transmission, and that transmits a substantial part of the programming supplied by such networks for a substantial portion of that station's broadcast day and includes and translator station or terrestrial satellite station that rebroadcasts all or substantially all of the programming broadcast by a network station.

(f) The term "primary network station" means a network station that broadcasts or rebroadcasts the basic programming service of a particular national network.

§ _____ Retransmission Consent.

A cable system or other multichannel video programming distributor shall obtain from a broadcast station (including radio and television stations) express authority for the retransmission of the signal of that station, except as provided in § _____.

§ _____ Exceptions.

The requirement in § _____ of obtaining retransmission consent shall not apply to retransmission of:

(a) A television broadcasting station that is carried on a cable system pursuant to the signal carriage provisions of § _____;

(b) A non-commercial broadcasting station;

(c) A television broadcasting station that is not owned or operated by, or affiliated with, a broadcasting network if the signal of such station is retransmitted directly to a home satellite antenna, if such signal was retransmitted by a satellite carrier on May 1, 1991;

(d) A television broadcasting station that is owned by, or affiliated with, a broadcasting network, and the signal of such station is retransmitted directly to a home satellite antenna, and the household receiving the signal is an unserved household; and

(e) A superstation if such signal was obtained from a satellite carrier and such station was a superstation on May 1, 1991.

§ _____ Order to Show Cause; Forfeiture Proceeding

(a) Upon petition by a station whose signal is being retransmitted; or a station owned by, or affiliated with, a network within whose Grade B contour the signal of another station owned by, or affiliated with, the same network is being retransmitted; the Commission may:

(i) Issue an order requiring a cable system operator or other multichannel video programming distributor to show cause why it should not be directed to cease and desist from violating the Commission's rules; or

(ii) Initiate a forfeiture proceeding against a cable system operator or other multichannel video programming distributor for violation of the Commission's rules.

(b) The petition may be submitted informally, by letter, but shall be accompanied by a certificate of service or any interested person who may be directly affected if an order to show cause is issued or a forfeiture proceeding initiated. An original and two copies of the petition and all subsequent pleadings should be filed.

(c) The petition shall state fully and precisely all pertinent facts and considerations relied on to support a determination that issuance of an order to show cause or initiation of a forfeiture proceeding would be in the public interest. Factual allegations shall be supported by affidavit of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them.

(d) Interested persons may submit comments or oppositions to the petition within 30 days after it has been filed. For good cause shown in the petition, the Commission may, by letter or telegram to known interested persons, specify a shorter time for such submissions. Comments or oppositions shall be served on petitioner and on all persons listed in petitioner's certificate of service, and shall contain a detailed full showing, supported by affidavit, of any facts or circumstances relied on.

(e) The petitioner may file a reply to the comments or oppositions within 20 days after the time or filing such comments or oppositions has ended. A reply shall be served on all persons who have filed pleadings and shall also contain a full detailed showing, supported by affidavit, of any additional facts or considerations relied on. For good cause shown, the Commission may specify a shorter time for the filing of replies.

(f) The Commission, after consideration of the pleadings, shall determine whether the public interest requires the issuance of an order to show cause or the initiation of a forfeiture proceeding.

Note 1: After issuance of an order to show cause, the rules of procedure in Title 47, Part 1, Subpart A, §§ 1.91-1.95 shall apply.

Note 2: Nothing in this section is intended to prevent the Commission from initiating show cause or forfeiture proceedings on its own motion; provided, however, that show cause proceedings and forfeiture proceedings pursuant to § 1.80(g) of the rules will not be initiated by such motion until the affected parties are given an opportunity to respond to the Commission's charges.

Note 3: Forfeiture proceedings are generally nonhearing matters conducted pursuant to § 1.80(f) of the rules (Notice of Apparent Liability). Persons who contend that the alternative hearing procedures of § 1.80(g) of the rules should be followed in a particular case must support this contention with a specific showing of the facts and circumstances relied on.